

St. John's Law Review

Volume 63
Number 4 *Volume 63, Summer 1989, Number 4*

Article 8

April 2012

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Recommended Citation

Cornell, Carolyn C. (1989) "The Toxic Mortgage: CERCLA Seeps into the Commercial Lending Industry," *St. John's Law Review*: Vol. 63 : No. 4 , Article 8.

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NOTE

THE TOXIC MORTGAGE: CERCLA SEEPS INTO THE COMMERCIAL LENDING INDUSTRY

American businesses produce hazardous substances¹ as a by-product of their manufacturing, agricultural, and industrial processes.² Most of these substances are not destroyed but are stored perpetually in hazardous waste disposal sites.³ In the last decade alone, the number of disposal sites has increased at an

¹ The term "hazardous waste," in this Note, is used interchangeably with the term "hazardous substance." "Hazardous substance" is defined in § 9601(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"). The definition includes substances regulated under the following statutory provisions: 1) any hazardous waste as defined under the Resource Conservation and Recovery Act of 1976 ("RCRA"), but not including any waste the regulation of which Congress has suspended; 2) any hazardous substance named in § 311 of the Clean Water Act; 3) any toxic pollutant named in § 307 of the Clean Water Act; 4) any hazardous air pollutant under § 112 of the Clean Air Act; or 5) any imminently hazardous chemical substance or mixture under § 7 of the Toxic Substances Act. See S. BRIGGUM, G. GOLDMAN, D. SQUIRE & D. WEINBERG, HAZARDOUS WASTE REGULATION HANDBOOK 64-65 (1985). The Environmental Protection Agency ("EPA") has listed 698 elements and compounds as hazardous substances. See 50 Fed. Reg. 13,474-522 (1985).

² See Note, *Developments in the Law: Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1462 (1986). American industry has released into the environment such hazardous substances as flammables, explosives, nuclear and petroleum fuel by-products, germ-laden refuse, toxic metals and numerous synthetic chemical compounds. *Id.* Amplifying the problem is "modern agriculture, with its reliance on chemical pesticides and fertilizers, and modern methods of animal husbandry." 1 F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 1.02, at 1-9 (1987). In 1986, the EPA estimated that 266 million metric tons of hazardous waste was produced by industries annually. See Comment, *The Liability of Financial Institutions for Hazardous Waste Cleanup Costs Under CERCLA*, 1988 WISC. L. REV. 139, 140.

³ See Note, *supra* note 2, at 1462. The process of storing waste consists of sealing it in drums and depositing the drums in clay-lined dumps. *Id.* The dumps are either placed underground between layers of rock or left in vacant lots, lagoons, or landfills. *Id.* Of the hazardous waste sites in existence, 74% use containers, 54% use tanks, 17% use surface impoundments, 6% incinerate wastes, and 5% use landfills. See COUNCIL ON ENVIRONMENTAL QUALITY, THIRTEENTH ANNUAL REPORT (1982).

alarming rate.⁴ As a result, the deadly consequences of improper disposal have become readily apparent.⁵ The Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA," "Superfund" or the "Act")⁶ was enacted by Congress in response to the growing concern⁷ over the hazards and risks associated with the dramatic increase in hazardous waste sites.⁸

⁴ See H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. 1, at 17, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6120-21. While the EPA estimated that in 1979, 30,000-50,000 inactive and uncontrolled hazardous waste sites existed in America, *id.*, there were 26,000 sites listed by the EPA in 1987. See Marcotte, *Toxic Blackacre: Unprecedented Liability for Landowners*, 73 A.B.A. J. 66, 67 (Nov. 1987). Furthermore, the General Accounting Office indicated that if a more comprehensive study were undertaken, the number of existing sights reported might be as high as 68,000. *Id.*

⁵ See Note, *supra* note 2, at 1462. "Exposure to hazardous wastes can cause cancer, genetic mutation, birth defects, miscarriages, and damage to the lungs, liver, kidneys, or nervous system." *Id.*; see also H.R. REP. NO. 1016, *supra* note 4, at 18-21, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6121-22 (describing areas destroyed by hazardous waste and citing health effects linked to disposal problems); Burkhart, *Lender/Owners and CERCLA: Title and Liability*, 25 HARV. J. ON LEGIS. 317, 317 (1988) (evidence establishes causal link between toxic chemical exposure and health problems such as cancer, birth defects and personality disorders).

⁶ Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C.A. §§ 9601-9675 (1983 & Supp. 1989)). CERCLA was a reenactment of the Solid Waste Disposal Act. See H.R. REP. NO. 1016, *supra* note 4, at 1, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6119. CERCLA was amended and its funds increased by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C.A. §§ 9601-9657 (1983 & Supp. 1989)). The fund has grown from \$1.6 billion to \$8.5 billion. See Klotz & Siakotos, *Lender Liability Under Federal and State Environmental Law: Of Deep Pockets, Debt Defeat and Deadbeats*, 92 COM. L.J. 275, 277 (1987).

⁷ See H.R. REP. NO. 1016, *supra* note 4, at 17-18, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6120.

[A] major new source of environmental concern has surfaced: the tragic consequences of improperly, negligently, and recklessly hazardous waste disposal practices known as the "inactive hazardous waste site problem." The unfortunate human health and environmental consequence of these practices has received national attention amidst growing public and Congressional concern over the magnitude of the problem and the appropriate course of response that should be pursued.

Id.; see also S. COOKE, *THE LAW OF HAZARDOUS WASTE: MANAGEMENT, CLEANUP, LIABILITY AND LITIGATION* § 1.01, at 1-3 (1988) ("management of hazardous wastes and the cleanup of hazardous waste sites . . . [are] two great areas of public concern"); Comment, *The Impact of the 1986 Superfund Amendments and Reauthorization Act on the Commercial Lending Industry: A Critical Assessment*, 41 U. MIAMI L. REV. 879, 879 (1987) (Congress enacted CERCLA in response to growing concern over inactive and abandoned hazardous waste sites).

⁸ See *supra* note 5 and accompanying text. Federal, state and local governments are expressing concern in economic terms. See Burkhart, *supra* note 5, at 318. For example, cleanup of the environmental disaster at Love Canal cost the government more than \$30 million. *Id.* It was estimated that a "properly secured disposal site" would have cost only

CERCLA, a broad and complex⁹ statute, was purposely designed to remedy the inadequacies of earlier regulatory legislation.¹⁰

Congress first attempted to address the environmental problem by adopting the Resource Conservation and Recovery Act ("RCRA"),¹¹ which regulated hazardous waste from its generation

four million dollars at the time of disposal. See H.R. REP. NO. 1016, *supra* note 4, at 20, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6123; see also *infra* note 10 (discussion of Love Canal disaster).

⁹ See 1A F. GRAD, *supra* note 2, § 4A.02, at 4A-19.

¹⁰ See H.R. REP. NO. 1016, *supra* note 4, at 22, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6125. RCRA has some significant regulatory deficiencies since it "is of no help if a financially responsible owner of the site cannot be located." *Id.* Further, the EPA does not provide funds for the cleanup of inactive sites "when the owner is unknown, is not responsible, or is financially unable to pay for these costs," and the EPA may only compel cleanup if the site poses an imminent hazard to the public health. See H.R. REP. NO. 1016, *supra* note 4, pt. 2, at 4, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6151, 6153; see also King, *Lenders' Liability for Cleanup Costs*, 18 ENVTL. L. 241, 253 (1988) (congressional committee reports indicate Congress intended CERCLA to fill gaps left by RCRA); Note, *When a Security Becomes a Liability: Claims Against Lenders in Hazardous Waste Cleanup*, 38 HASTINGS L.J. 1261, 1263 (1987) (CERCLA enacted to close gaps in federal hazardous waste laws). See generally W. FRANK & T. ATKESON, *SUPERFUND: LITIGATION AND CLEANUP 1* (1985) (problem of hazardous waste disposal not addressed in form of comprehensive legislation, but targeted as amendments to existing environmental legislation).

A good example of the legislative deficiencies is reflected in the crisis that occurred in 1978 at Love Canal, a New York neighborhood developed over an inactive and abandoned hazardous waste site. See Glass, *Superfund and SARA: Are There Any Defenses Left?*, 12 HARV. ENVTL. L. REV. 385, 387 (1988). Chemicals formerly buried at the site were found in the water supply and in the ground surface, causing a variety of health problems for Love Canal residents. *Id.* Although RCRA regulated hazardous waste at the time, it "did not authorize the EPA to respond quickly to the release or threatened release of toxic wastes in an abandoned site." *Id.* at 388. The EPA was thus limited because RCRA covered only "active hazardous waste sites; it did not contemplate abandoned sites which may jeopardize health." *Id.* In addition, the provisions of the Clean Water Act were insufficient for cleanup purposes as they applied to only surface water and not ground water. See *id.*; see also Clean Water Act, 33 U.S.C. §§ 1251-1376 (1982 & Supp. V 1987).

¹¹ Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C.A. §§ 6901-6987 (1983 & Supp. 1989)). The Solid Waste Disposal Act of 1965 was "amended, reorganized, and expanded" by RCRA. See 42 U.S.C.A. §§ 3251-3259 (1977). The purpose of RCRA is to prevent further contamination of the environment by regulating and managing the creation of new hazardous waste sites. See King, *supra* note 10, at 243-45. RCRA requires the EPA to identify and maintain a list of hazardous wastes which may be stored or disposed of only at facilities which fulfill certain EPA restrictions and operate under special permits. See Note, *supra* note 2, at 1471. RCRA further imposes restrictions regarding the maintenance of records of hazardous substances, and the storing and disposing of the hazardous wastes in containers. *Id.* Further, RCRA also requires a more comprehensive system of reporting the types of hazardous substances which may be generated, transported or disposed. *Id.* Failure to satisfy these requirements could result in both civil and criminal penalties. *Id.*

to disposal.¹² The RCRA, however, failed to provide adequate guidelines for the cleanup of toxic waste sites existing prior to the enactment of the statute.¹³ In adopting CERCLA, Congress endeavored to cure these deficiencies¹⁴ by vesting the federal and state governments¹⁵ with the authority to respond promptly¹⁶ to releases¹⁷ or threatened releases¹⁸ of hazardous waste substances. To finance government action, the statute established a \$1.6 billion Superfund¹⁹ to subsidize the Environmental Protection Agency

¹² See Klotz & Siakotos, *supra* note 6, at 276-77. The goal of RCRA was to prevent the creation of hazardous waste sites, not to cure them. *Id.*

¹³ *Id.* RCRA applies only prospectively and "applies to past sites only to the extent that they are posing an imminent hazard." See H.R. REP. NO. 1016, *supra* note 4, at 22, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6125; see also *United States v. Price*, 577 F. Supp. 1103, 1109 (D.N.J. 1983) (although Congress attempted to address environmental problem through previous legislation, it failed to provide relief for consequences of prior reckless and improper hazardous waste disposal practices).

¹⁴ See *Price*, 577 F. Supp. at 1109 (CERCLA was enacted in response to deficiencies in RCRA); H.R. REP. NO. 1016, *supra* note 4, at 22, reprinted in U.S. CODE CONG. & ADMIN. NEWS 6119, 6125 ("It is the intent of the Committee . . . to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites").

¹⁵ See 42 U.S.C.A. § 9604(a)(1) (Supp. 1989). CERCLA authorizes the President to commence actions for containment, cleanup and removal of hazardous waste substances. *Id.* In addition, the EPA and a state or political subdivision may enter into an agreement where both take action on a cost-sharing basis. See 42 U.S.C.A. § 9604(c)-(d) (Supp. 1989). Many states have adopted programs similar to the federal statute, and in some instances impose even greater obligations. See N.H. REV. STAT. ANN. §§ 147-B:2, :10 (1988); OR. REV. STAT. § 469.205 (1987).

¹⁶ See *United States v. Mottolo*, 605 F. Supp. 898, 902 (D.N.H. 1985) (CERCLA enacted to provide government with mechanism for prompt and effective response to threats posed by hazardous waste disposal); *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982) (same).

¹⁷ The term "release" is broadly defined in CERCLA as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment." 42 U.S.C.A. § 9601(22) (1983 & Supp. 1989). SARA expanded the definition to include the "abandonment or discarding of barrels, containers and other closed receptacles containing any hazardous substance or pollutant or contaminant." *Id.*

¹⁸ See *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1045 (2d Cir. 1985). The court in *Shore Realty* held that the defendant's "suggestion that CERCLA does not impose liability for threatened releases" was a frivolous claim. *Id.* Further, the court stated: "Section 9607(a)(4)(A) imposes liability for 'all costs of removal or remedial action'. The definitions of 'removal' and 'remedial' explicitly refer to actions 'taken in the event of the threat of release of hazardous substances'." *Id.* (citing the Senate Report reprinted in 1 CERCLA Legislative History at 361). The court also held that leaking tanks and pipelines, continuing leaching, and seepage from earlier spills and leaking drums, constituted "releases" under CERCLA. *Id.* In addition, corrosion and deterioration of tanks, the defendant's lack of experience and expertise in handling hazardous waste, and the failure to have the facility licensed, all amounted to a threat of a release. *Id.*

¹⁹ See Klotz & Siakotos, *supra* note 6, at 277. CERCLA had established the Hazardous

("EPA") in the cleanup of contaminated facilities.²⁰ After the cleanup, the EPA may seek reimbursement from the party found responsible for the contamination.²¹

The goal of CERCLA is to fix liability for improper waste disposal.²² The statute holds "potentially responsible parties" ("PRPs"),²³ such as owners and operators²⁴ of hazardous waste

Substance Response Trust Fund ("Superfund"). See 42 U.S.C. § 9631 (1982) (repealed 1986). Originally, the Superfund was financed primarily through excise taxes on the oil and chemical industries. See Klotz & Siakotos, *supra* note 6, at 277. SARA established the Hazardous Substance Superfund, which is in effect a continuation of the Hazardous Substance Response Trust Fund. See 26 U.S.C.A. § 9507 (Supp. 1989). The federal government is authorized to use the Superfund for governmental responses to hazardous waste problems, to pay claims arising from the response activities of private parties, and to pay federal and state governmental bodies for natural resource damage. See 42 U.S.C.A. § 9611(a) (Supp. 1989).

²⁰ See 42 U.S.C.A. § 9601(9) (Supp. 1989). CERCLA defines a facility as: "(A) any building, structure, . . . pipe, . . . storage container, motor vehicle, . . . or (B) any site or area where a hazardous substance has been deposited, . . . or otherwise come to be located." *Id.* Courts have interpreted this definition broadly. See, e.g., *New York v. General Elec. Co.*, 592 F. Supp. 291, 297 (N.D.N.Y. 1984) (drag strip upon which contaminated oil was placed for dust control held to be "facility"); *United States v. Metate Asbestos Corp.*, 584 F. Supp. 1143, 1148 (D. Ariz. 1984) (residential trailer park situated next to asbestos mill held to be "facility" because of presence of asbestos). For purposes of this Note, the terms "facility" and "site" will be used interchangeably.

²¹ See 42 U.S.C.A. § 9607(a)(4) (Supp. 1989).

²² See H.R. REP. NO. 253, 99th Cong., 1st Sess., pt. 3, at 15, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3038, 3038. Congress drafted CERCLA as a "broad response and liability mechanism," and intended the scope of liability to be far-reaching. Comment, *supra* note 7, at 884 (quoting H.R. Doc. No. 93, 93d Cong., 1st Sess. 71 (1983)); see also *CERCLA 1985: A Litigation Update*, [15 News & Analysis] *Env'tl. L. Rep.* (Env'tl. L. Inst.) 10,395, 10,396 (1985) (thrust of CERCLA is to force private parties responsible for release of hazardous substances to clean up the sites, thereby saving Superfund money for emergency situations and sites where no responsible parties can be located). CERCLA also serves as a powerful mechanism on behalf of the government to secure cleanup agreements through informal negotiations. *Id.*

²³ CERCLA does not formally define "potentially responsible party." However, the term is frequently used in referring to parties who may be held liable under CERCLA. See 1 C.F.R. § 305.84-4 (1989) (PRPs are "site owners and operators and users of sites such as transporters and waste generators").

The term "responsible person" is used in CERCLA, though without definition. See 42 U.S.C.A. § 9607(c) (Supp. 1989). For purposes of this paper, PRP will encompass both PRPs and responsible persons.

²⁴ See 42 U.S.C.A. § 9601(20)(A) (Supp. 1989). CERCLA defines an "owner" or "operator" as:

(i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated or otherwise controlled activities at such facility immediately be-

sites, and generators and transporters of hazardous waste,²⁵ strictly liable²⁶ for the costs of the cleanup. Excluded from liability are persons²⁷ who do not participate in the management of the facility but who hold "indicia of ownership primarily to protect [their] security interest[s] in the . . . facility."²⁸ The enormity of the hazardous waste problem,²⁹ coupled with the sparsity of substantial

forehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

Id.

²⁵ See *id.* § 9607(a). The theory behind § 9607 is to impose liability not only on those who directly benefited from the hazardous waste site, i.e., the generators, transporters, and operators, but also on persons benefiting indirectly by virtue of the site's operation, i.e., a site owner who does not directly operate it. See Burkhardt, *supra* note 5, at 334-35; see also *infra* note 27 and accompanying text (defining "person" under CERCLA).

Some commentators have found lenders to be within the group receiving an indirect benefit from the operation of the hazardous waste site since the lender receives principal and interest payments produced by the site's operation. See Burkhardt, *supra* note 5, at 335.

²⁶ Although Congress specifically deleted the strict liability provision contained in the original Senate bill, it stated that CERCLA liability shall be construed as liability under § 311 of the Clean Water Act, 33 U.S.C. § 1321 (1982), which has been construed as a strict liability provision. See *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1140 n.4 (E.D. Pa. 1982). Thus, courts have interpreted CERCLA as imposing strict liability. See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985) (CERCLA imposes strict liability on current owner of facility without regard to causation); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823, 843-45 (W.D. Mo. 1984) (intent of Congress in passing CERCLA was to impose strict liability standard), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); *United States v. Price*, 577 F. Supp. 1103, 1113-14 (D.N.J. 1983) (legislative history of CERCLA indicates standard of strict liability, subject only to affirmative defenses listed in 42 U.S.C. § 107(b)).

Courts have also held CERCLA liability to be joint and several among responsible parties when the harm is indivisible. See, e.g., *United States v. Stringfellow*, 661 F. Supp. 1053, 1060 (C.D. Cal. 1987); *United States v. Conservation Chem. Co.*, 589 F. Supp. 59, 63 (W.D. Mo. 1984); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 811 (S.D. Ohio 1983). This feature encourages the EPA to focus its actions on large, commercial entities with "deep pockets." See Klotz & Siakotos, *supra* note 6, at 279. CERCLA liability has also been construed to apply retroactively. See *Northeastern Pharmaceutical*, 810 F.2d at 732-34.

²⁷ See 42 U.S.C.A. § 9601(21) (Supp. 1989). CERCLA defines a "person" as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." *Id.*

²⁸ *Id.* § 9601 (20)(A). The policy behind this provision was to encourage the extension of credit by not including lenders within the CERCLA liability scheme. See Berz & Sexton, *Superfund Collides with Lenders' Concerns*, Legal Times, Dec. 23, 1985. Congress attempted to strike a balance between this policy and CERCLA's policy of imposing liability on deep-pocket defendants by restricting the exemption to lenders who do not participate in the management of borrowers' facilities. *Id.*

²⁹ See *supra* notes 4-5 and accompanying text; see also Burkhardt, *supra* note 5, at 321 (magnitude of damage resulting from improperly disposed hazardous waste and enormous cost of cleaning up contaminated waste justify broad net of liability).

legislative history³⁰ to aid in clarifying CERCLA's ambiguous liability provisions,³¹ led courts to extend liability to parties which have only tangential relations with the polluted site.³² The enactment of the Superfund Amendments and Reauthorization Act ("SARA") in 1986³³ affirmed this extension by tacitly adopting the judicially created scope of liability³⁴ and expanding the Superfund tax base.³⁵ Congress' action reflected a policy that pollution of the

³⁰ See, e.g., *United States v. Mottolo*, 605 F. Supp. 898, 905-06 (D.N.H. 1985) (CERCLA carries virtually no direct legislative history); *United States v. Price*, 577 F. Supp. 1103, 1109 (D.N.J. 1983) (because of haste in CERCLA's adoption, Congress unable to provide a clarifying committee report); Comment, *supra* note 7, at 886 ("few committee reports are available to clarify legislative intent").

³¹ See, e.g., *Northeastern Pharmaceutical*, 579 F. Supp. at 838 n.15 (courts placed in position of construing inadequately drawn legislation "marred by vague terminology and deleted provisions"); Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 1-2 (1982) (CERCLA's legislative history is confusing and sparse); Comment, *supra* note 7, at 886 (CERCLA is a particularly difficult statute for the judiciary to interpret because ambiguities and material omissions often obfuscate the intended meaning of its provisions").

³² See Comment, *Lender Liability for Hazardous Waste: An Economic and Legal Analysis*, 59 U. COLO. L. REV. 659, 662 (1988). Some courts have reasoned that since Congress intended the "owner and operator" definitions to be interpreted broadly, any party having an interest in a hazardous waste facility faces CERCLA liability. *Id.*; see, e.g., *Northeastern Pharmaceutical*, 579 F. Supp. at 847-49 (vice president and shareholder was held personally liable for wastes disposed of by corporation); *United States v. Argent Corp.*, [14 Litigation] Env'tl. L. Rep. (Env'tl. L. Inst.) 20,616, 20,616 (D.N.M. 1984) (owner/lessor is potentially liable party under CERCLA); *United States v. Carolawn Co.*, [14 Litigation] Env'tl. L. Rep. (Env'tl. L. Inst.) 20,698, 20,698-99 (D.S.C. 1984) (imposing CERCLA liability on firm which held title for one hour in order to transfer property).

³³ Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at 42 U.S.C.A. §§ 9601-9657 (Supp. 1989)).

³⁴ See Comment, *supra* note 7, at 894. SARA revised and expanded many of CERCLA's provisions, most notably the innocent landowner affirmative defense. See *infra* note 62 and accompanying text. In addition, Congress expanded liability by providing that a landowner may be liable for selling property without disclosing a known hazardous waste condition, 42 U.S.C.A. § 9601(35)(c) (Supp. 1989), and by increasing the monetary amount of potential liability. *Id.* § 9601(24); see also Klotz & Siakotos, *supra* note 6, at 281 (SARA's increasing amount of potential monetary liability is likely to raise average cost of cleanup from nine million to between \$30 and \$50 million).

SARA also enables the government to place a federal lien on contaminated property to ensure that owners of property which has been cleaned up at the government's expense will not receive a windfall profit when the property is subsequently sold. See 42 U.S.C.A. § 9607(1) (Supp. 1989); Klotz & Siakotos, *supra* note 6, at 295. The lien, however, is not a "superlien" and therefore is subordinated to secured interests perfected prior to the filing of the federal lien. *Id.*

Congress, however, made no substantial changes to the overall liability scheme. See Comment, *supra* note 2, at 155 nn.71 & 74; see also Note, *Successor Liability of Financial Institutions Under CERCLA—A Takings and Policy Analysis*, 1988 COLUM. BUS. L. REV. 243, 244 (SARA does not represent major change in philosophy regarding liability).

³⁵ See 26 U.S.C.A. § 9507 (Supp. 1989). SARA increased the Superfund to \$8.5 billion.

environment is a societal problem, the burden of which should rest not only on those primarily responsible for the pollution but also on a wider range of parties.³⁶

The most recent area to feel the impact of CERCLA liability has been the commercial lending industry.³⁷ Congress drafted the security interest exemption to afford protection to lenders extending credit.³⁸ However, narrow constructions of the security interest exemption³⁹ and the third party affirmative defense⁴⁰ indicate that a lender is potentially responsible for CERCLA response costs notwithstanding the fact that the lender did not participate

Id. Under SARA, the financing of the Superfund would come from "excise taxes on petroleum and feedstock chemicals, a new excise tax on imported chemical derivatives, and a new environmental income tax." King, *supra* note 10, at 255 n.62 (1988). In addition, \$1.25 billion of general revenue appropriations are targeted for the Superfund. *Id.*

³⁶ See, e.g., Schwenke, *Environmental Liabilities Imposed on Landowners, Tenants, and Lenders—How Far Can and Should They Extend?*, [18 News & Analysis] ENVTL. L. REP. (Envtl. L. Inst.) 10,361, 10,362 (1988) ("Senate Finance Committee report, in support of a broadening of the tax base through general fund subsidies, recognized that cleanup of abandoned hazardous waste sites was a 'broad societal problem' . . . [and] that costs of cleanup must now be apportioned over a broader range of parties").

³⁷ See *infra* notes 66-108 and accompanying text; see also Fleischaker & Mitchell, *The Insecurities of Security Interests in Hazardous Waste Cases*, 9 Nat'l L.J. 18, 20 (Sept. 15, 1986) (outlining increasing risks in industrial loan transactions). Lenders are especially concerned about the prospect of liability because insurance companies typically do not cover liability for hazardous waste related injuries and cleanup costs. See Adler & Broiles, *The Pollution Exclusion: Implementing the Social Policy of Preventing Pollution Through the Insurance Policy*, 19 LOY. L.A.L. REV. 1251, 1251-60 (1986).

CERCLA also affects lenders because the imposition of cleanup costs, fines, criminal penalties and injunctive relief seriously affects a borrower's ability to repay loans. See, e.g., King, *supra* note 10, at 265 (imposition of fines, criminal sanctions, injunctive relief, and adverse publicity have negative influence on borrower's financial condition and ability to meet financial obligations); Rosenbaum, *Bankruptcy and Environmental Regulation: An Emerging Conflict*, [13 News & Analysis] ENVTL. L. REP. (Envtl. L. Inst.) 10,099, 10,099 (1983) (skyrocketing costs of environmental cleanup have forced some companies out of business). See generally Lockett & Soriano, *Hazardous Waste Liability: The Emerging Problem for Lenders*, 1986 CHEM. WASTE LITIG. REP. 45 (discussion of CERCLA's effect on lenders' rights when borrower is bankrupt). In addition, a lender's ability to recoup its loan may be affected by the enactment of state "Superliens," which take priority over liens of secured creditors. See, e.g., *In re Berg Chem. Co.*, No. 82-B 12052(HB) (Bankr. S.D.N.Y. July 9, 1984) (order granting City of New York First Lien and Superpriority).

³⁸ See H.R. REP. No. 172, 96th Cong., 2d Sess., pt. 1, at 36, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6160, 6181.

³⁹ See *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 580 (D. Md. 1986). *But see* *United States v. Mirabile*, [15 Litigation] Env'tl. L. Rep. (Env'tl. L. Inst.) 20,993, 20,994 (E.D. Pa. 1985); *In re T.P. Long Chem., Inc.*, 45 Bankr. 278, 288-89 (Bankr. N.D. Ohio 1985).

⁴⁰ See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1048-49 (2d Cir. 1985) (affirmative defense of third party); see also *infra* notes 62-65 and accompanying text (discussing affirmative defenses).

in the management of the facility or in the generation or transportation of the hazardous waste.⁴¹

This Note will address first the background and structure of CERCLA, specifically focusing on its liability and defense provisions. It will then examine the developing liability of lenders as owners and operators under CERCLA and the security interest exemption, and suggest a dual analysis in determining the proper scope of this liability. Finally, this Note will analyze the rationale behind subjecting lenders to potential liability and suggest lending procedures that would protect a lender's rights in a loan agreement, while still furthering the goals and policies of efficient hazardous waste management.

I. STATUTORY OVERVIEW

CERCLA was enacted in 1980 during the final days of the 96th Congress.⁴² Though it emerged only after six years of work in the House and three in the Senate,⁴³ the final bill was a hastily drafted compromise between one Senate⁴⁴ and two House bills.⁴⁵ Thus, "[a]lthough Congress had worked on 'Superfund' toxic and hazardous waste cleanup bills . . . the actual bill which became law had virtually no legislative history" to assist in interpreting the Act's liability provisions.⁴⁶ In addition, Congress specifically deleted from the final Act certain provisions regarding the standard of liability, leaving the issue for judicial determination through common law principles.⁴⁷ As a result, courts have played a signifi-

⁴¹ See *Maryland Bank & Trust*, 632 F. Supp. at 577-82.

⁴² See Grad, *supra* note 30, at 1. CERCLA was adopted by a "lame duck" Congress prior to the beginning of the Reagan administration. *Id.* Due to the results of numerous congressional studies and the tragedy at Love Canal, Congress was determined to have the proposed legislation enacted prior to the end of its term. See Glass, *supra* note 10, at 388-89.

⁴³ See 1 ENVTL. L. INST., SUPERFUND: A LEGISLATIVE HISTORY xiii (1982). The 96th Congress considered four major bills. "Three of these bills . . . were fully developed . . . with hearings, committee reports, amendments and floor debates." *Id.* The fourth bill never went beyond the committee stage. *Id.*

⁴⁴ See S. 1480, 96th Cong., 2d Sess., 126 CONG. REC. 30,898 (1980).

⁴⁵ See H.R. 7020, 96th Cong., 2d Sess., 126 CONG. REC. 26,336, 26,757 (1980); H.R. 85, 96th Cong., 2d Sess., 126 CONG. REC. 26,194, 26,369 (1980).

⁴⁶ See Grad, *supra* note 30, at 1.

⁴⁷ See 126 CONG. REC. 31,965 (daily ed. Apr. 2, 1980). Representative Florio, who introduced one of the proposed CERCLA bills, stated that the provisions providing for joint and several liability were deleted so that courts could determine the standard under common law principles. *Id.*

cant role in defining, construing and expanding the scope of hazardous waste liability.

CERCLA provides the EPA with a dual mechanism for the cleanup of a site contaminated by the release, or threatened release, of a hazardous substance. First, through its power delegated by the President,⁴⁸ the EPA may order the responsible party to clean up the site.⁴⁹ Second, the EPA itself may clean the site,⁵⁰ financed by money from the Superfund, and subsequently sue the responsible party for reimbursement.⁵¹ Response costs include expenses for the removal⁵² of the toxic material or any other necessary remedial actions,⁵³ any harm or destruction to natural resources,⁵⁴ the "planning and implementation of a response action,"⁵⁵ and "the costs of any health assessment or health effects stud[ies]" undertaken pursuant to statutory authority.⁵⁶

⁴⁸ See 42 U.S.C.A. § 9606(a) (1983). Section 9606(a) enables the President to order an abatement of a hazardous condition that poses "an imminent and substantial endangerment to the public health or welfare or the environment." *Id.* This power was delegated to the Administrator of the EPA. See Exec. Order No. 12,580, 3 C.F.R. § 193 (1988), reprinted in 42 U.S.C.A. § 9615 (Supp. 1989).

⁴⁹ See 42 U.S.C.A. § 9604(a) (Supp. 1989). A refusal to obey a cleanup order can result in a fine of up to \$25,000 a day. See *id.* § 9606(b)(1).

⁵⁰ See *id.* § 9604(1)(B). Any response activity undertaken by the EPA must include the "necessary costs of response [and be] consistent with the national contingency plan." *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1429 (S.D. Ohio 1984) (quoting 42 U.S.C.A. § 9607(a)(4)(B) (1983)). The EPA initiates removal action, which may include "removing released hazardous substances, monitoring [the site], limiting access, or temporarily evacuating the area." S. BRIGGUM, G. GOLDMAN, D. SQUIRE & D. WEINBERG, *supra* note 1, at 100. The EPA may take remedial action only at sites which are listed on the National Priorities List ("NPL"). *Id.* at 101. But see *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1045-46 (2d Cir. 1985) (NPL inclusion is not a prerequisite for state to recover response costs).

⁵¹ See 42 U.S.C.A. § 9607(a) (Supp. 1989). To recover response costs, the EPA must establish that: "1) [t]he site is a 'facility'; 2) [a] 'release' or 'threatened release' of any 'hazardous substance' from the site has occurred; 3) [t]he release or threatened release has caused the United States to incur 'response costs'; and 4) [t]he defendant is one of the persons designated as a party liable for costs." *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 576 (D. Md. 1986).

⁵² See 42 U.S.C.A. § 9607(a)(4)(A) (Supp. 1989). CERCLA defines "removal" as including any actions necessary to 1) clean up or remove hazardous substances; 2) "monitor, assess, and evaluate the release"; 3) dispose of removed material; or 4) "prevent, minimize, or mitigate damage to the public . . . or to the environment." *Id.* § 9601(23).

⁵³ See *id.* § 9607(a)(4)(A). CERCLA defines "remedial action" as including actions "consistent with permanent remedy taken instead of or in addition to removal actions" in order "to prevent or minimize the release of hazardous substances." *Id.* § 9601(24).

⁵⁴ See *id.* § 9607(a)(4)(C).

⁵⁵ *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823, 850 (W.D. Mo. 1984), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

⁵⁶ 42 U.S.C.A. § 9607(a)(4)(D) (Supp. 1989).

II. LIABILITY PROVISIONS

The EPA is authorized to seek recovery for response costs against four categories of PRPs. First, persons who are the current owners or operators of the hazardous waste site are potentially liable.⁵⁷ Courts have construed this category literally so that a current, innocent owner is liable despite the fact that the dumping occurred during a prior ownership.⁵⁸ Second, liability is imposed on persons who owned or operated the facility at the time of the hazardous waste disposal,⁵⁹ thus insuring that a "polluter" cannot escape liability by selling the contaminated property.⁶⁰ The third and fourth categories are the generators and the transporters of hazardous waste.⁶¹

III. AFFIRMATIVE DEFENSES

CERCLA liability is subject to certain enumerated defenses. A PRP can escape liability by establishing that the release or threatened release of hazardous substances resulted solely from an act of God, an act of war, an unrelated third party, or any combination of the above.⁶² The third party defense, the most hotly litigated of the affirmative defenses, applies only if the third party is

⁵⁷ See *id.* § 9607(a)(1).

⁵⁸ See *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1043-45 (2d Cir. 1985).

⁵⁹ See 42 U.S.C.A. § 9607(a)(2) (Supp. 1989).

⁶⁰ See *id.* This category has been construed to include a past owner or operator only if the hazardous substances were stored during the time he owned or operated the site. See *Cadillac Fairview/Cal., Inc. v. Dow Chem. Co.*, [14 Litigation] *Envtl. L. Rep.* (Envtl. L. Inst.) 20,376, 20,378 (C.D. Cal. 1984).

⁶¹ See 42 U.S.C.A. § 9607(a)(3) (Supp. 1989). Liability exists under this subsection when "any person who by contract, agreement, or otherwise arranged for disposal or treatment, . . . of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances." *Id.* This provision is construed broadly, and a company which generates one percent or less of the total volume of hazardous substances at a site may be forced to pay for the cleanup of the entire site. See generally *Moore & Kowalski, When is One Generator Liable for Another's Waste?*, 33 *CLEV. ST. L. REV.* 93, 94-105 (1984-85) (discussing CERCLA decisions that address joint and several liability and causation issues involving small generators of wastes).

Section 9607 imposes liability for a release upon "any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person." 42 U.S.C.A. § 9607(a)(4) (Supp. 1989).

⁶² See 42 U.S.C.A. § 9607(b) (1983). In 1986, SARA created a new definition for the third party defense. See H.R. REP. NO. 962, 99th Cong., 2d Sess., 132 *CONG. REC.* H9084-85 (daily ed. Oct. 3, 1986). The revised definition was intended to clarify the CERCLA goal of imposing liability only on those responsible for the creation of the hazardous waste and not on innocent subsequent purchasers. *Id.*

not an agent or employee of the PRP or one in a contractual relationship with the PRP.⁶³ Moreover, the PRP must establish that due care was exercised⁶⁴ and precautions were taken "against foreseeable acts or omissions of any such third party."⁶⁵

IV. SECURITY INTEREST EXEMPTION

The security interest exemption of CERCLA⁶⁶ seemed to afford a lender a safe harbor from classification as an owner or operator, provided that title was held primarily to protect a security interest and the lender did not participate in the management of the borrower's hazardous waste site.⁶⁷ Courts have disagreed, how-

⁶³ See 42 U.S.C.A. § 9607(b)(3) (1983). The definition of "contractual relationship," for the purposes of a § 9607(b)(3) defense, includes "land contracts, deeds or other instruments transferring title or possession." *Id.* § 9601(35)(A) (Supp. 1989). Generally, a PRP is precluded from raising the innocent landowner defense if the PRP was in a "contractual relationship" with a third party responsible for the release of a hazardous substance. *See id.* § 9607(b)(3) (1983).

SARA created a statutory exception to the definition of a "contractual relationship" if, at the time the PRP acquired the facility, the PRP "did not know and had no reason to know" of the disposal of a hazardous substance. *See id.* § 9601(35)(A)(i) (Supp. 1989). The PRP must also establish that after obtaining actual knowledge of the presence of the hazardous substance, due care with respect to the substance was exercised and precautions against foreseeable acts or omissions of the third party was taken. *See id.* § 9607(b)(3) (1983); Comment, *supra* note 7, at 896. This defense is quite narrow, however, because § 9601(35)(B) imposes a stringent duty of inquiry on potential land owners. *See id.* § 9601(35)(B) (Supp. 1989). The PRP "must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability." *Id.* For purposes of the foregoing, the court must consider any "specialized knowledge or experience" the PRP possesses, "commonly known or reasonably ascertainable information about the property, the obviousness of the . . . contamination" or threatened contamination of the property, and the ability to detect it. *Id.*

Lenders faced with potential CERCLA liability will have great difficulty in establishing this defense because of the strict duty of inquiry. *See James, Financial Institutions and Hazardous Waste Litigation: Limiting the Exposure to Superfund Liability*, 28 NAT. RESOURCES J. 329, 337-38 (1988). The duty of inquiry will be especially difficult to satisfy since CERCLA's legislative history indicates that "[t]hose engaged in commercial transactions should . . . be held to a higher standard [of inquiry] than those who are engaged in private residential transactions." H.R. REP. NO. 962, 99th Cong., 2d Sess., 132 CONG. REC. H9085 (daily ed. Oct. 3, 1986).

⁶⁴ *See* 42 U.S.C.A. § 9607(b)(3)(a) (1983).

⁶⁵ *See id.* § 9607(b)(3)(b).

⁶⁶ *See id.* § 9601(20)(A) (Supp. 1989). The definition of "owner or operator" excludes "a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." *Id.*

⁶⁷ *See id.*; *see also* United States v. Fleet Factors Corp., [19 Litigation] Envtl. L. Rep. (Envtl. L. Inst.) 20,529, 20,530-31 (S.D. Ga. 1988) (secured creditor who "did not own, operate or . . . control activities at the facility" not liable under CERCLA despite participation

ever, as to whether this exemption applies to a foreclosing lender who acquires ownership of the property to satisfy a secured debt.⁶⁸ It is submitted that these conflicting decisions can be reconciled by applying a dual analysis of lender liability, which includes an evaluation of the status of the lender after foreclosure followed by an assessment of lender participation in the management of the facility.

In *In re T.P. Long Chemical, Inc.*,⁶⁹ a lender holding a perfected security interest was held not to be an owner or operator of a bankrupt debtor's hazardous waste site.⁷⁰ After finding the debtor and his estate liable as owners,⁷¹ the court refused to extend liability to the secured creditor, BancOhio, when the bankruptcy estate was unable to pay the EPA's claim.⁷² After finding that the removal of the hazardous waste did not benefit BancOhio in the preservation or sale of its collateral, the court further stated in dicta, that even if BancOhio had foreclosed, it would not have acquired "owner" status since BancOhio acted only to preserve its security interest, and hence fell within the ambit of the security interest exemption.⁷³

in public auction of site's equipment and inventory).

⁶⁸ Compare *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 579 (D. Md. 1986) (exemption does not apply to foreclosing lender who retained property four years) with *United States v. Mirabile*, [15 Litigation] Env'tl. L. Rep. (Env'tl. L. Inst.) 20,993, 20,994 (E.D. Pa. 1985) (exemption does apply where lender foreclosed and subsequently assigned the land).

⁶⁹ 45 Bankr. 278 (Bankr. N.D. Ohio 1985). In *Long*, BancOhio National Bank ("BancOhio") held a "perfected security interest in the accounts receivable, equipment, fixtures, and other personal property" belonging to the Long's rubber recycling plant. *Id.* at 280. In 1982, after filing for bankruptcy, the Long's personal property was auctioned off, except for buried drums containing hazardous wastes. *Id.* at 281. Since the drums were part of the property, they were subject to BancOhio's security interest. *Id.* These drums were discovered by the EPA, which had undertaken remedial action following the release of another hazardous substance on the property. *Id.* The EPA sought reimbursement out of the funds held by the bankruptcy trustee which were subject to BancOhio's security interest. *Id.* at 280.

⁷⁰ *Id.* at 288-89.

⁷¹ *Id.* at 284. The trustee for the bankrupt estate argued that since the drums were not auctioned off with the rest of the property, they were abandoned pursuant to § 554(c) of the Bankruptcy Code and the interest therein reverted to the debtor. *Id.* at 284-85. The court rejected this argument, noting that in addition to the trustee's failure to take positive steps to abandon the drums, CERCLA's liability scheme prohibits any transfer of potential liability. *Id.* at 285; see 42 U.S.C.A. § 9607(e)(1) (1983).

⁷² *Long*, 45 Bankr. at 288-89.

⁷³ *Id.* The court found that there was no benefit to BancOhio since BancOhio's collateral was sold prior to the commencement of the EPA's removal action. *Id.* at 288. Consequently, the EPA's expenditures could not be considered a traditional "cost incident to the

In *United States v. Mirabile*,⁷⁴ the EPA filed a CERCLA reimbursement claim against the Mirabiles, the current owners of a hazardous waste site. The Mirabiles sought contribution from American Bank and Trust Company ("ABT") and Mellon Bank (East) National Association ("Mellon Bank"),⁷⁵ two banks which had loaned money to the site's former corporate owner, Turco.⁷⁶ Following dismissal of Turco's bankruptcy proceedings, ABT foreclosed and acquired ownership of the property at the foreclosure sale.⁷⁷ Having taken certain actions with respect to the property,⁷⁸ ABT assigned it to the Mirabiles four months after acquiring ownership.⁷⁹ Granting ABT's motion for summary judgment,⁸⁰ the district court noted that even though ABT had acquired full title to the property, its "actions with respect to foreclosure were plainly undertaken in an effort to protect [its] security interest in the property."⁸¹ In addition, the *Mirabile* court held that the bank's financial involvement in the property was incident to holding the security interest, and its participation in purely financial aspects of the operation did not reach the level of participation that would justify the imposition of CERCLA owner liability.⁸²

The court faced a "cloudier situation" with respect to Mellon

sale of property." *Id.* Furthermore, since the drums "had no value as collateral" the EPA's expenditures were not a cost of preserving the bank's "collateral." *Id.* The court found that the only "indicia of ownership" exercised by BancOhio was "to protect its security interest." *Id.* at 289. It was also undisputed that BancOhio did not participate in the management of the waste site. *Id.*

⁷⁴ [15 Litigation] *Env'tl. L. Rep. (Env'tl. L. Inst.)* 20,994, (E.D. Pa. 1985).

⁷⁵ *Id.* at 20,995. The Mirabiles alleged that the banks had, through their financial dealings with the previous owner, Turco, assisted in creating the hazardous conditions at the site. *Id.* at 20,996. The banks in turn counterclaimed against the United States, claiming that the Small Business Administration's involvement at the site created the condition. *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* These activities consisted of securing the building against vandalism by boarding up windows and changing locks, making inquiries as to the cost of disposing of drums located on the property, and, through its loan officer, visiting the site several times for the purpose of showing it to potential buyers. *Id.* at 20,995.

⁷⁹ *Id.* at 20,996.

⁸⁰ *Id.* at 20,997. ABT also argued in its motion that under Pennsylvania law, ownership acquired through the sheriff's sale vested ABT with only equitable title, which never ripened into legal title by virtue of the assignment of the bid to the Mirabiles. *Id.* at 20,996. The court found this argument to be irrelevant, and relied solely on the security interest exemption. *Id.* at 20,996.

⁸¹ *Id.*

⁸² *Id.*

Bank.⁸³ When Turco experienced financial difficulties, Mellon Bank became increasingly involved in the company's operations.⁸⁴ The court denied Mellon Bank's motion for summary judgment and noted that, while a lender's financial involvement in its borrower's affairs usually would not trigger owner liability,⁸⁵ involvement constituting participation in the operational, production or waste disposal activities would impose such liability on the lender.⁸⁶

The *Long* and *Mirabile* courts restricted lender liability based exclusively on the security interest exemption without considering the impact of foreclosure. In so doing, it is suggested that the courts employed reasoning inconsistent with the history and goals of CERCLA liability and created a class of landowners exempt from liability "based on an artificial distinction drawn from the circumstances by which the realty was acquired."⁸⁷ It is submitted that before a court addresses the security interest exemption of CERCLA, the interest of the lender in the property should first be determined.

In *United States v. Maryland Bank & Trust Co.*,⁸⁸ suit was filed against Maryland Bank & Trust ("MB&T"), which had fore-

⁸³ *Id.* at 20,997.

⁸⁴ *Id.* For example, one of Mellon Bank's loan officers was a member of Turco's Advisory Board, while another provided post-bankruptcy oversight of the company. *Id.* One of the loan officers stated in his deposition that he became involved with Turco because Mellon Bank wanted him to have more of a "day-to-day hands-on involvement including monitoring the cash collateral accounts, ensuring that receivables went to the proper account, and establishing a reporting system between the company and the bank." *Id.* Although this activity alone would not justify liability, the court concluded that additional testimony rendered uncertain the actual extent of Mellon Bank's involvement. *Id.*

⁸⁵ *Id.* at 20,995-97. The *Mirabile* court found the following types of involvement insufficient to hold the lender liable as an owner: 1) establishing a ceiling on dividends and salaries payable to the borrower's officer; 2) retaining the authority to approve the purchasing of life insurance for the borrower's employees; 3) general involvement in the accounting and records of the borrower; and 4) assisting the borrower with marketing or sales strategies in activities which do not specifically involve the generation, disposal, or storage of hazardous wastes. *Id.*

⁸⁶ *Id.* at 20,996.

⁸⁷ See Note, *supra* note 10, at 1286.

⁸⁸ 632 F. Supp. 573 (D. Md. 1986). In the 1970s, Maryland Bank & Trust Co. ("MB&T") loaned money to Herschel McLeod, Sr., for use in his trash and garbage business. *Id.* at 575. In 1972, McLeod allowed the dumping of hazardous waste on a piece of property owned by him. *Id.* In 1980, McLeod's son bought his father's property with financing from MB&T. *Id.* MB&T instituted a foreclosure action against the property in 1981 and purchased it in 1982 after the son defaulted on the loan payments. *Id.* The EPA instituted a cleanup action on the site in 1983, after MB&T failed to commence corrective action at the site. *Id.* The EPA's response costs were approximately \$551,000. *Id.* at 576.

closed and purchased contaminated property.⁸⁹ In support of its motion for summary judgment, the bank relied on the security interest exemption and on the third party defense.⁹⁰ In holding MB&T liable, the court initially focused on whether MB&T was an owner and operator as defined by CERCLA. Although the language of the applicable provision appears to cover only persons who were *both* the owner *and* the operator,⁹¹ the court construed the wording disjunctively, finding that ownership alone was sufficient to impose liability. In rejecting a defense based on the security interest exemption, the court noted that "[t]he verb tense of the exclusionary language is critical. The security interest must exist at the time of the clean-up."⁹² The court determined that upon the lender's foreclosure and subsequent purchase of the property at the foreclosure sale, the security interest terminated and the lender's interest ripened into full title, thereby effectively negating the security interest exemption.⁹³ It is submitted that this line of reasoning reflects Congress' intent in drafting the security interest exemption and is in accordance with the principles underlying modern lending laws.⁹⁴

The *MB&T* court noted that Congress drafted the security interest exemption to give lenders in different states equal protection

⁸⁹ *Id.* at 575. MB&T still owned the property when the trial commenced four years later. *Id.*

⁹⁰ *Id.* at 576. The court reserved judgment on the third party defense until after trial. *Id.* at 581-82.

⁹¹ See 42 U.S.C.A. § 9607(a) (Supp. 1989). The *MB&T* court noted that proper grammatical usage would hold liable only persons who were both owners and operators, but concluded that to "slavishly follow the laws of grammar while interpreting acts of Congress would violate sound canons of statutory interpretation." *Maryland Bank & Trust*, 632 F. Supp. at 578. Furthermore, since an owner could not be the same person as an operator, allowing such a definition would render the provision "totally useless." *Id.* In addition, this argument would be inconsistent with CERCLA's imposition of strict liability, as a landowner would be liable only if he had actually participated in the operation of the hazardous waste site. *Id.*; see also *United States v. Argent Corp.*, 21 Env't. Rep. Cas. (BNA) 1354, 1356 (D.N.M. 1984) ("CERCLA's legislative history shows a deliberate omission . . . of language . . . which would have required participation in management or in operation as prerequisite to owner liability").

⁹² *Maryland Bank & Trust*, 632 F. Supp. at 579.

⁹³ *Id.* The court concluded that MB&T purchased the property to protect its investment, not to protect its security interest, as the security interest existed only during the life of the mortgage. *Id.*

⁹⁴ See Note, *supra* note 10, at 1289. "Mortgage law makes no distinction in the character of ownership acquired by a mortgagee when it purchases the mortgage property. . . . [A mortgagee in possession] is personally liable for tort injuries resulting from its use of the property or its failure to perform duties imposed by law upon landowners." *Id.*

despite differences in state lending laws.⁹⁵ In lien theory states, the lender acquires a security interest in the property and retains only the right to sell the property if the borrower defaults.⁹⁶ In title theory states, however, the property is actually conveyed to the lender who retains title by operation of the common law.⁹⁷ The *MB&T* court, finding support in CERCLA's legislative history, distinguished between title theory ownership and ownership acquired through foreclosure, and held that the security interest exemption does not cover "former mortgagees currently holding title after purchasing the property at a foreclosure sale."⁹⁸

Policy considerations also played a factor in the court's determination of liability.⁹⁹ Allowing *MB&T* to escape liability would have resulted in unjust enrichment in that lenders could acquire the property cheaply at the foreclosure sale, free of potential liability, and, following an EPA funded cleanup, sell the sanitized property at a profit.¹⁰⁰ In addition, exempting lenders/owners would have been inconsistent with CERCLA's purpose and statutory scheme and "would [have] convert[ed] CERCLA into an insurance scheme for financial institutions, protecting them against possible losses due to the security of loans with polluted properties."¹⁰¹

The court in *MB&T* narrowly construed *Mirabile*, concluding that it would apply only to situations where the mortgagee-turned-owner promptly assigned the property, since the history and policies underlying CERCLA did not support a more generous interpretation of the security interest exemption.¹⁰²

While *MB&T* essentially eviscerated the security interest exemption for foreclosing lenders who acquire ownership of the contaminated property, a recent decision in the Southern District of Georgia indicates that a nonforeclosing lender will come within the security interest exemption standard set forth in *Mirabile*. In *United States v. Fleet Factors Corp.*,¹⁰³ the court refused to im-

⁹⁵ *Maryland Bank & Trust*, 632 F. Supp. at 579.

⁹⁶ See G. NELSON & D. WHITMAN, *REAL ESTATE FINANCE LAW* § 4.1, at 142-45 (2d ed. 1985).

⁹⁷ *Id.*

⁹⁸ *Maryland Bank & Trust*, 632 F. Supp. at 579.

⁹⁹ See *id.* at 579-80.

¹⁰⁰ *Id.* at 580.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ [19 Litigation] *Env'tl. L. Rep. (Env'tl. L. Inst.)* 20,529 (S.D. Ga. 1988). *Fleet Factors Corp.* ("Fleet") had entered into a factoring agreement in 1976 with Swainson Print Works,

pose CERCLA "operator" liability on a lender who had liquidated its borrower's equipment and inventory, but who had not foreclosed on the property.¹⁰⁴ Conceding that Fleet Factors Corporation ("Fleet"), the lender, was not an owner or operator, the Department of Justice maintained that Fleet's activities constituted participation in the management of the facility and therefore negated a defense based on the security interest exemption.¹⁰⁵ The *Fleet Factors* court, however, expanded the liability standards of *Mirabile*, and concluded that a lender can give general financial assistance and "even isolated instances of specific, management advice to its creditors without risking CERCLA liability if the secured creditor does not participate in the day-to-day management of the business or facility either before or after the business ceases operation."¹⁰⁶

It is submitted that although the reasoning in *MB&T* and *Fleet Factors* may appear inconsistent, the actual result reached in each case was correct. Where a lender has foreclosed and subsequently assumed ownership, as in the *MB&T* situation, it should be held liable as an owner or operator unless it can successfully establish one of the CERCLA affirmative defenses.¹⁰⁷ By focusing

Inc. ("Swainson"), providing Swainson with operating funds in exchange for Swainson's assignment of its accounts receivable. *Id.* In 1979, Swainson filed for bankruptcy. *Id.* at 20,530. Fleet and Swainson continued with their arrangement until 1981, when Swainson was adjudicated a bankrupt. *Id.* In 1982, Fleet was allowed to hire a liquidator and foreclose on the inventory and equipment. *Id.* The Department of Justice (the "Department") argued that Fleet contributed to or caused the contamination of the site in that during the course of the liquidation auction and in removing certain machinery, Fleet's salvager caused a release of friable asbestos from the pipes connected to the machinery. *Id.* In addition, the Department maintained that even though a bankruptcy trustee had been appointed, Fleet controlled access to the property and retained the authority for the removal of machinery and equipment that was not sold at the auction or removed by the purchaser. *Id.* The Department also emphasized that prior to foreclosing, Fleet retained veto power over whether credit would be extended to certain customers. *Id.* The court, however, found this to be a "normal practice for a secured lender." *Id.*

¹⁰⁴ See *id.*

¹⁰⁵ *Id.* at 20,531.

¹⁰⁶ *Id.* Significantly, "although [the Justice Department] provided evidence of Fleet's day-to-day involvement in [Swainson's] operations during the liquidation, these facts were not even acknowledged in the court's opinion." *Lender Liability Under CERCLA: The Impact of Fleet Factors*, Banking Rep. (BNA) No. 12, at 701 (Mar. 20, 1989).

¹⁰⁷ See Burcat, *Foreclosure and United States v. Maryland Bank & Trust Co.; Paying the Piper or Learning How to Dance to a New Tune?*, [17 News & Analysis] Envtl. L. Rep. (Envtl. L. Inst.) 10,098, 10,099-100 (1987). The *MB&T* court has been criticized for its reasoning since it could have imposed liability through an "analysis of basic principles of the law of mortgage foreclosure, rather than speculative public policy arguments." *Id.*

on the owner/operator issue, the lender would be held liable to the same extent as any other PRP which acquired ownership of contaminated property,¹⁰⁸ and would thus be precluded from reaping a profit at the government's expense.

If the lender has not foreclosed, or foreclosed without acquiring ownership, the inquiry should focus on the security interest exemption. It is suggested that a court should focus, as in *Fleet Factors* and *Mirabile*, on the extent of the lender's involvement in the facility to determine whether or not the purpose of participation was primarily to preserve its security interest. If the activities surpass the threshold set forth in those cases, the lender should be held liable as a CERCLA operator.

V. JUSTIFICATIONS FOR CERCLA LENDER LIABILITY

Although the increased scope of CERCLA liability leaves lenders with very few options,¹⁰⁹ subjecting lenders to potential CERCLA liability will encourage safer hazardous waste disposal practices¹¹⁰ and foster improved lending procedures.¹¹¹ First, the limited availability of the third party defense will urge lenders to scrutinize more carefully the practices and activities of those seeking credit.¹¹² Consequently, a potential borrower may be deterred

¹⁰⁸ See Comment, *supra* note 2, at 177 (lender who foreclosed, bidded, and assumed ownership should be held liable to same extent as any other bidder at foreclosure sale).

¹⁰⁹ See Burkhart, *supra* note 5, at 344-49, 350-57, 384-90. A lender could opt not to foreclose on contaminated property or delay foreclosure until after the property is cleaned up. In light of the SARA amendments, this may be a favorable alternative, as the cost of a CERCLA cleanup may greatly exceed the outstanding loan or value of the property. See *id.* at 344-49. The lender could foreclose, assume ownership, and attempt to avoid liability under the third party defense. *Id.* at 350-57. The lender, if sued, could join the borrower as a third party defendant or sue the borrower for contribution. See *id.* at 384-90 (discussion of lender/owners rights to contribution).

¹¹⁰ See, e.g., *id.* at 334 (CERCLA liability scheme forces those benefitting from dumping activities to internalize costs caused by unsafe disposal practices and utilize safety disposal methods to avoid future liability); Comment, *supra* note 2, at 183-85 (discussion of CERCLA liability scheme creating incentives for safer disposal practices).

¹¹¹ See generally Angelo & Bergeson, *The Expanding Scope of Liability for Environmental Damage and its Impact on Business Transactions*, 8 CORP. L. REV. 101, 113-21 (1985) (discussing, *inter alia*, warranties, indemnification agreements, certification, and notice and disclosure requirements); Dragna, *Contaminated Collateral: How Lenders Can Reduce Their Environmental Exposure*, 10 L.A. LAW. 25, 30 (Jan. 1988) (recommending environmental questionnaires and environmental liability checklists for use by lenders); James, *supra* note 63, at 353-55 (discussion of lenders conducting environmental audits/programs and assessments of potential borrowers facilities as a prerequisite to acquiring loan); Marcotte, *supra* note 4, at 68-70 (same).

¹¹² See Klotz & Siakotos, *supra* note 6, at 286 (conditions placed on defense may re-

from dumping hazardous waste on its property or may be prompted to utilize safer disposal methods. Second, because *Fleet Factors* and *Mirabile* expanded the activities lenders may participate in, lenders will have more leeway in monitoring the use of the mortgaged property without forfeiting the security interest exemption.¹¹³

CONCLUSION

As applied in the commercial lending arena, CERCLA presents a conflict between two competing policies: the environmental policy of providing effective and manageable standards for the cleanup of hazardous waste disposal sites to protect public health and the environment, and the equally compelling policy of affording protection to the rights and interests of innocent parties. The *Mirabile* court clearly subordinated the environmental policy by liberally construing CERCLA's security interest exemption and, by creating a special class of owners exempt from liability, rendered a decision inconsistent with Congress' purposes and goals in enacting the statute. The *MB&T* court achieved a balance between the two concerns by narrowly reading the exemption, holding the acquisition of title at foreclosure to be the standard for imposing liability. In so doing, the court properly recognized that upon acquiring title, the lender's security interest terminates and ripens into full ownership. While the decision in *Fleet Factors* preserves the security interest exemption for nonforeclosing lenders, the potential for CERCLA lender liability remains alarming. Therefore, more circumspect lending policies and programs should be instituted by creditors. Such actions would aid in the protection of lenders' rights, while having the salutary side effect of forcing borrowers to utilize safer disposal methods. Thus, both policies underlying CERCLA—the effective cleanup of the environment and the insulation from liability of innocent lenders—would be fulfilled.

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quire lender to fully investigate condition of property prior to foreclosing or making loan).

¹¹³ See Note, *supra* note 10, at 1295. One commentator urges that further expansion of these activities may be necessary to effectuate the goal of safer waste disposal while still enabling lenders to fall within the security interest exemption. *Id.*; see also Comment, *supra* note 2, at 180-81 (courts' narrower interpretation of "management" will allow lenders to have some influence over borrowers' hazardous waste activities, "a result which is more beneficial to the lender, the borrower, and society").